84-1548

No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY,

Petitioner,

vs.

HOWARD H. HUMPHRIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI

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64 pp

Question Presented

Whether Pennsylvania Rule of Civil Procedure No. 238, concerning the award of pre-judgment interest, applies in a federal employers' liability act case heard in state court?

Parties to this Proceeding

All parties to this proceeding are listed in the caption. The names of all parent companies, subsidiaries and affiliates of Petitioner Pittsburgh & Lake Erie Railroad Company are listed in the Appendix.

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IN THE

Supreme Court of the United States

October Term, 1984

No._____

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY,

Petitioner,

VS.

HOWARD H. HUMPHRIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Pittsburgh & Lake Erie Railroad Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in this case on October 27, 1984.

Opinions Below

The Opinion of the Superior Court of Pennsylvania, at No. 538, Pittsburgh 1982, dated April 27, 1984, is not yet officially reported. Its unofficial citation is 476 A.2d 919 (Pa. Super. 1984). A copy of the slip opinion appears in the Appendix. The Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, at G.D. 78-23858, dated April 16, 1982, is not yet officially or unofficially reported, and also appears in the Appendix.

Jurisdiction

The judgment of the Court of Common Pleas of Allegheny County was issued on April 16, 1982, and was entered on May 12, 1982. The judgment and Opinion of the Superior Court of Pennsylvania was filed and entered on April 27, 1984. A timely Application for Reargument to the Superior Court was denied on July 6, 1984. A timely Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on January 7, 1985. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

Constitutional and Statutory Provisions Involved

The following statutes are involved in this case:

Federal Employers' Liability Act, Act of Apr. 22, 1908, Section 1, 35 Stat. 65, as amended, 45 U.S.C. Section 51 *et seq.*

Pennsylvania Rule of Civil Procedure No. 238.

Amendment V, United States Constitution

Amendment XIV, United States Constitution

Pertinent portions of the text of these provisions are printed in the Appendix.

Statement of the Case

On November 17, 1981, a jury sitting in the Court of Common Pleas of Allegheny County, hearing this Federal Employers' Liability Act (FELA) action, returned a verdict for respondent in the amount of $12,400.00. The respondent then filed a post-trial motion requesting the award of pre-judgment interest on the verdict, pursuant to Pennsylvania Rule of Civil Procedure No. 238. The trial judge so molded the verdict, and this petitioner then filed an appropriate and timely Motion for Judgment *N.O.V.* or for Remolding the Verdict, a copy of which is included in the Appendix.

The federal questions in this case were first raised in the Motion for Judgment *N.O.V.* or for Remolding the Verdict, in which this petitioner asserted that the state rule permitting pre-judgment interest is contrary to the applicable law under FELA. Also, this petitioner asserted in that Motion that the rule permitting pre-judgment interest violates due process and equal protection.

The trial court decided that Rule 238 is procedural, and therefore applicable, rather than substantive, and denied petitioner's motion to remold the verdict. (See Appendix).

The Superior Court of Pennsylvania recognized this issue as one of first impression in Pennsylvania, and recognized the uniformity of precedent, both federal and state, precluding the application of state pre-judgment rules in FELA cases, but ruled to the contrary, and affirmed the trial court's award of pre-judgment interest under Rule 238. In a footnote, the Superior Court deemed the constitutional objections to Rule 238 as waived, on the mistaken grounds that these issues were not raised in the Court of Common Pleas.

Following the Superior Court's affirmance of the trial court's Opinion and Order, the petitioner filed a timely Application for Reargument, which was denied. The petitioner then filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on January 7, 1985. This Petition for a Writ of Certiorari was filed within 90 days from that date.

Argument

The present action arises under the Federal Employers' Liability Act (FELA), 45 U.S.C. Section 51 *et seq.*, Act of April 22, 1908, 35 Stat. 65, as amended. State courts share concurrent jurisdiction over FELA actions with federal district courts, but the measure damages in suits under FELA is determined by federal law and decisions. *Chesapeake & Ohio Railroad Company v. Kelly*, 241 U.S. 45, 36 S.Ct. 630 (1916). Annotation, 79 ALR 2d 568; 32 Am.Jur. 2d Section 75. In *Kelly*, this Honorable Court stated that "the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under [FELA] it must be settled according to the general principles of law administered in federal courts." 241 U.S. at 491.

In *Norfolk & Western Railroad Company v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755 (1980), this Honorable Court reiterated this position: "It has long been settled that questions concerning the measure of damages in a FELA action are federal in character." At this point in the *Liepelt* opinion, the Court noted the legislative intent underlying FELA, stating that:

> "One of the purposes of [FELA] was to 'create uniformity throughout the union' with respect to railroads' financial responsibility for injuries to their employees. H.R.Rep. No. 1386, 60th Congress, First Session, page 3 (1908)."

100 S.Ct. at 757, n. 5.

The importance of uniformity of application of the federal FELA right is also enunciated in *Dice v. Akron, Canton and Youngstown Railroad Company*, 342 U.S. 359 (1952), where this Honorable Court stated,

> "Congress in Section 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling

> in determining what the incidents of this federal right shall be. (Citations omitted). . . Only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. See *Garrett v. Moore-McCormack Company*, 317 U.S. 239, 244, and cases there cited." 342 U.S. at 361.

By imposing a state rule of damages, the decision of the Pennsylvania Superior Court effectively forecloses this overriding federal interest.

Furthermore, Federal Courts of Appeal as well as state courts in other states have uniformly held that various state pre-judgment interest statutes cannot be applied in FELA actions.[1] In its opinion in this case, the Superior Court of Pennsylvania expressed its awareness of these principles and cases, but arrived at a decision contradictory to the uniform federal and state precedent.

It was, apparently, the Superior Court's analysis of *Olsen v. Shell Oil Company*, 708 F.2d 976 (5th Cir. 1983), that persuaded the Court to apply Rule 238 in this case. In *Olsen*, pre-judgment interest under state law was awarded in a case tried under the Outer Continental Shelf Lands Act, 43 U.S.C. Section 1331 *et seq.* (OCSLA). The Superior Court construed *Olsen* as "[endorsing] the awarding of pre-judgment interest to a

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[1] *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847 (5th Cir. 1944), *Murphy v. Lehigh Valley R.R.*, 63 F. Supp. 928 (E.D.N.Y. 1945), aff'd 158 F.2d 481 (2nd Cir. 1946), *Briggs v. Pa. R.R.*, 164 F.2d 21 (2nd Cir. 1947), aff'd on other grounds 334 U.S. 304, 68 S.Ct. 609 (1948), *Chicago, M., St. P., & P.R.R. v. Busby*, 41 F.2d 617 (9th Cir. 1930), *Kozar v. Chesapeake & Ohio R.R.*, 449 F.2d 1238 (6th Cir. 1971), *Faulkenberry v. Louisiana & Arkansas Ry.*, 551 F.2d 650 (5th Cir. 1977), *Wicks v. Central Railroad Co. of N.J.*, 129 N.J. Super. 145, 322 A.2d 488 (1974), cert. den. 66 N.J. 317. 331 A.2d 17 (1974), *Felder v. Union Pacific Railroad Co.*, 660 P.2d 911 (Colo. App. 1982), *Bennett v. Atchison, T & S.F. Ry. Co.*, 174 N.W. 805 (Iowa, 1919).

plaintiff, who sues under a federal statute, *when the remedy is based upon and supported by the state law where the district court sits,*" (emphasis supplied by Superior Court). The Superior Court construed *Olsen* as implicitly overruling *Louisiana and Arkansas Railway Company v. Pratt, supra.* However, the emphasis supplied by the Superior Court itself points out the vital differences between *Olsen,* an OCSLA case, and *Pratt,* a FELA case. The OCSLA, by its terms, provides that state law controls and provides both substantive *and remedial* rights for plaintiffs suing thereunder. 43 U.S.C. Section 1333(a)(2)(A). Thus, it is entirely proper to award pre-judgment interest to "a prevailing OCSLA plaintiff whose remedy is based on surrogate state law," when that state law provides for pre-judgment interest. The award of such interest was based not upon the general federal interest statute, 28 U.S.C. Section 811 (now Section 1961) itself, but upon "other principles of law," which in *Olsen* was found in the federal OCSLA statute providing a federal cause of action based on state rights and remedies. In the instat case, however, rights and remedies are solely federal, as provided by FELA, and no "other principles of law" arising from local rights or remedies may interfere with the vital policy of national uniformity and federal supremacy.

The Superior Court suggested that the result in *Olsen,* as well as the Court's decision in the present case, were foreshadowed by *Louisville and Nashville Railway Company v. Stewart,* 241 U.S. 261, 36 S.Ct. 586 (1916), and by *Massachusetts Beneficial Association v. Miles,* 137 U.S. 689, 11 S.Ct. 234 (1891). Neither of these cases is germane. In *Stewart,* the United States Supreme Court permitted post-judgment interest, calculated according to a state statute, to be applied in a FELA action. However, the state statute applied as a matter of

federal law, on the basis of the federal general interest statute, which permits the awarding of post-judgment interest. *Stewart* therefore conforms to the unanimous voice of precedent in both federal and state courts forbidding the application of state rules concerning pre-judgment interest in FELA cases. In *Miles*, a diversity case, the Supreme Court of the United States permitted the application of a state statute imposing interest on verdicts. This result is consistent with post-Erie cases concerning the applicability of state law in diversity actions. However, the *Miles* case, as a diversity action, has no bearing on FELA actions or on the policy of national uniformity so vital in FELA actions.

Recently, the Middle District of Pennsylvania, in *Camplese v. Consolidated Rail Corporation*, 594 F. Supp. 44 (M.D. Pa. 1984), and the Eastern District of Michigan, in *Newman v. Grand Trunk Western Railroad Co.*, No. 82-70951 (E.D. Mich. S.D., July 12, 1984), both refused to award pre-judgment interest in FELA cases heard in federal court.[2] Even more recently, in *Carver v. Consolidated Rail Corporation*, No. 83-2309 (E.D. Pa. December 27, 1984), Chief Judge Luongo of the Eastern District of Pennsylvania addressed the issue and refused to award pre-judgment interest under Rule 238.

Judge Luongo's rationale is instructive and merits attention. Citing *Liepelt, supra*, and *Faulkenberry, supra*, the court stated that the availability of interest in any action arising under a federal statute is governed by

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[2] Also recently, counsel learned of a decision of a federal district court in Colorado that awarded prejudgment interest in a FELA action. *Garcia v. Burlington Northern Railroad Company*, No. 82-C-1260 (D.C. Colo., November 29, 1984). This points out that there is even some disagreement among federal courts on this issue, warranting this Honorable Court's intervention.

federal law, and not by the law of the forum state. (Slip Opinion, page 2). The court then noted that neither FELA nor the federal general interest statute, 28 U.S.C. Section 1961, provides for pre-judgment interest. Some courts have concluded that this congressional silence "is indicative of a considered purpose that no interest should be allowed in [FELA] actions prior to verdict," thereby superceding state statutes on the subject, citing *Faulkenberry, supra, Kozar, supra, Pratt, supra,* and *Wicks, supra.* But Judge Luongo reasoned that disallowance of pre-judgment interest follows not necessarily from that construction but from an examination of the intent of the statute underlying the right of recovery in the case at hand.

Judge Luongo's analysis follows the principle of this Honorable Court's ruling in *Rodgers v. United States,* 332 U.S. 371, 373 (1947), that, absent an express statutory prohibition, the decision whether to grant pre-judgment interest should depend upon Congress' purpose in enacting the statute under which the case arises, and upon general equitable principles. In applying the *Rodgers* criteria, Judge Luongo came to his conclusion that Rule 238 should not be applied.

Judge Luongo noted the precedent establishing that the availability of pre-judgment interest under Rule 238 has a substantive impact upon the rights of litigants. See *Jarvis v. Johnson,* 668 F.2d 740, 746 (3d Cir. 1982), and *Renner v. Lichtenwalner,* 413 F. Supp. 271, 273 (E.D. Pa. 1981). However, a major purpose in the enactment of FELA was the creation of national uniformity with respect to the compensation of injured railroad employees. *Liepelt, supra.* This intent would be undermined if Courts were to modify judgments under FELA to include a substantive state damage remedy.

Furthermore, Judge Luongo quoted at length from the Middle District's opinion in *Camplese, supra,* 594 F. Supp. 44, 47-48:

> "FELA reflects the dissatisfaction of Congress with the common law duty of a master to his servant. This statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The general congressional intent was to provide *liberal* recovery for the injured worker. . . . FELA seeks to adjudge the cost of human injury and the inescapable expense of railroading, *equitably* between the worker and the carrier. . . . FELA enlarges the rights of railroad employees to recover for injuries by stripping the employer of his common law defenses and for all practical purposes the inquiry is limited to the question of whether negligence of the employer played *any* part, however small, in the injury which is the subject of the suit. . . . [I]t is evident that Congress, by enacting FELA, has adjusted the equities between the railroad employer and the injured employee. To grant pre-judgment interest would undermine the equities that have been balanced by the act itself. This court does not believe that pre-judgment interest should apply in FELA cases.

At slip opinion, page 4 (emphasis in original).

Judge Luongo wrote in full awareness of the Superior Court's decision in the present action (slip opinion, pages 4, 5). He criticized the Superior Court's opinion in this case for reasoning that relied not on an analysis of the interests served by FELA, but instead on the construction that FELA and the Federal General Interest Statute do not by their terms explicitly prohibit pre-judgment interest. He also criticized the Superior Court for its reliance upon *Olsen, supra,* for the reasons stated above in this Petition. Judge Luongo concluded, however, that while a state court hearing a FELA action

may apply its own procedural rules, it may not apply state rules which defeat the underlying policies of a federal statute, citing *Arnold v. Panhandle & Santa Fe Railway Company*, 353 U.S. 360, 361 (1957).

A conflict therefore exists not only between state courts in various states, but also between federal courts and state courts. This issue of the effect of state rules on the underlying policy of this federal statute, and the long-standing interpretation of FELA prohibiting pre-judgment interest, has been met with differing responses in differing fora, and the issue is deserving of this Honorable Court's attention.

II.

The Superior Court of Pennsylvania resolved not to address the constitutional issues regarding the application of Pennsylvania Rule of Civil Procedure No. 238, because the Court found the issues to be waived. (See Appendix, page 6a of the Slip Opinion, n.2). The Court cited *Benson v. Penn Central Transportation Company*, 463 Pa. 37, 41, 342 A.2d 393, 395 (1975). In that case, the appellant had failed to file a post-verdict motion. The same factual circumstance led to the decision in each of the cases cited in the *Benson* opinion. However, in the present case, the appropriate and timely-filed post-trial motion did in fact raise the constitutional issues of equal protection and due process, contrary to the finding of the Superior Court. The Motion for Judgment *N.O.V.* or for remolding the verdict reads in pertinent part as follows:

> "3. The verdict, as molded by the Court allowing delay damages in this Federal Employer's Liability Act action, is violative of the due process and equal protection clauses of the Pennsylvania and Federal Constitutions."

The constitutional issues have thus been properly raised, and warrant resolution on their merits.

Rule 238 violates both equal protection and due process under the Pennsylvania Constitution and under Amendments V and XIV of the United States Constitution. The starting point of equal protection analysis is the determination of whether the state has created a classification for the unequal distribution of benefits or imposition of burdens.

Rule 238 permits only the plaintiff to benefit from any delay between the filing of a lawsuit and the trial in action. It grants the defendant an exemption from the damage surcharge only if the verdict does not exceed 125% of an offer made by the defendant. The rule does not provide for pre-judgment interest to be awarded to the defendant if it is the plaintiff who delays the action. The mandatory language of the rule precludes the Court from using its discretion to determine the propriety of awarding these damages. If the reason for the rule lies in the Court's desire to speed cases along and reduce backlog, the rule bears no relation to this purpose because the absence of the trial court's discretion eliminates the only opportunity the Court system possesses to determine whether delay in fact occurred and who was responsible for it.

The rule thus fails the traditional "rational basis" test of equal protection, under which test classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 75-76, 30 L.Ed. 2d 225 (1971). The rule's mandatory, unfair, and unequal imposition of

burdens upon one party in all instances prevents it from having its desired effect upon the efficiency of the court system.

The lack of a reasonable relation between Rule 238 and its object also demonstrates that Rule 238 violates due process in the substantive sense. The guiding proposition in this area is that a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive, or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. *McGowan v. State of Maryland*, 366 U.S. 427, 81 S.Ct. 1101 (1961). Rule 238 lacks a reasonable relation to its desired object not merely because it discriminates unfairly between plaintiffs and defendants, either of who may be responsible for delay, but also because the rule does not discriminate fairly enough between groups of defendants. It has been asserted that the theory underlying the rule is that the real defendant parties—insurance companies—have the use of plaintiff's money for the time before a verdict is rendered. However, the rule does not distinguish the case of an individual defendant in a personal injury case, who is not represented by an insurance company, and who does not have the ability to use or invest funds in as knowledgeable a manner as an insurance company.

Conclusion

For the foregoing reasons, it is respectfully requested that this Honorable Court grant this Petition for Certiorari to the Superior Court of Pennsylvania, because the decision of the Superior Court in this case is contrary to the unanimous precedent in state courts of all jurisdictions, and because there is a conflict among opinions of federal courts of appeals on this issue, and because of the important federal issues involved.

Respectfully submitted,

ROBERT S. GARRETT, ESQ.
ALAN M. SHAPIRO, ESQ.
EGLER, ANSTANDIG,
GARRETT & RILEY
Attorneys for Pittsburgh and Lake Erie Railroad Company, Petitioner

Certificate of Service

I hereby certify that on this 28th day of March, 1985, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to John Gismondi, Esquire, 808 Grant Building, Pittsburgh, Pennsylvania, 15219, counsel for Respondent. I further certify that all parties required to be served have been served.

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Pittsburgh, Pennsylvania 15219

Counsel for Petitioner

Request for Entry of Appearance

SUPREME COURT OF THE UNITED STATES

No._____

Pittsburgh & Lake Erie Railroad Company,
Petitioner,

v.

Howard M. Humphries,
Respondent.

The Clerk will enter my appearance as Counsel of Record for *Pittsburgh & Lake Erie Railroad Company,* who in this Court is Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States:

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APPENDIX A

Opinion and Order of the Superior Court of Pennsylvania

SUPERIOR COURT OF PENNSYLVANIA
Pittsburgh District

No. 538 PITTSBURGH 1982

HOWARD H. HUMPHRIES,

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION AND THE BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL OF: PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

ORDER

AND NOW, this 27th day of April, 1984, it is ordered as follows:

X Judgment Affirmed.

____Order Reversed and Case Remanded with instructions.

____Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

____Order Modified as set forth in opinion filed herewith.

____Ordered as set forth in opinion filed herewith.

____Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

____Costs to be taxed as provided in opinion filed herewith.

____Judgment of Sentence Affirmed.

____Appeal Quashed.

BY THE COURT
IRMA T. GARDNER
Deputy Prothonotary

APR 27 1984

NOTE: Unless another date is hereinafter set forth, the foregoing Order was entered on the docket on the date set forth above. Order entered:_____

Appendix A—Opinion and Order of the Superior Court of Pennsylvania.

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 538 Pittsburgh, 1982

HOWARD H. HUMPHRIES,

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION AND THE BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL OF: PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

Appeal from the Judgment of the Court of Common Pleas of Allegheny County, Civil Division at No. G.D. 78-23858.

BEFORE: WIEAND, TAMILIA and POPOVICH, *JJ.*:

OPINION BY POPOVICH, *J.*:

FILED: April 27, 1984

This is an appeal from the Judgment of the Court of Common Pleas of Allegheny County, entered following an *en banc* Order denying appellant's (Pittsburgh & Lake Erie Railroad Co.'s) motion for judgment *non obstante veredicto.* Pa.R.App.P. 301(a). We affirm in a case of first impression.

Appendix A—Opinion and Order of the Superior Court of Pennsylvania.

On October 6, 1978, plaintiff-appellee (Howard H. Humphries) filed a complaint in trespass alleging, in relevant part, that:

> *THIRD:* At all times relevant to this suit, the defendant[-appellant] was a common carrier of freight for hire and by rail and was engaged in interstate commerce.
>
> * * * *
>
> *FIFTH:* Jurisdiction is conferred upon this court under and by virtue of the provisions of the Federal Employers' Liability Act of Congress . . ..
>
> *SIXTH:* On or about May 19, 1978, at approximately 12:30 p.m., the plaintiff was performing his duties as a track laborer for the defendant on the defendant's single main track, Mon River Bridge, Homestead, Pennsylvania. Plaintiff was engaged in work which was within the scope of his employment. The plaintiff, along with three other servants of the defendant, was using a rail stretcher to perform his assigned duties. During the course of this activity, a bolt that was attached to the rail stretcher broke and the plaintiff was caused to fall to the ground by reason of the defendant's negligence with the result that the plaintiff suffered severe injuries and damages . . ..

In conclusion, a claim for damages in an amount in excess of $10,000.00 was sought.

Thereafter, following the disposition of various pretrial items (*e.g.*, interrogatories, statements and depositions), the case proceeded to trial and a jury found for the

plaintiff in the amount of $12,400.00. The plaintiff followed this with a submission of a motion seeking prejudgment interest pursuant to Pennsylvania Rule of Civil Procedure No. 238.[1] The court entered an order that remolded the verdict by "adding delay damages in the amount of $3,203.00, reflecting a total award of $15,603.00." What ensued was the filing of an appeal questioning the propriety of the award as to the delay damages.

---

[1] Pennsylvania Rule of Civil Procedure No. 238 provides, in pertinent part:

> [I]n an action seeking monetary relief for bodily injury, death, or property damage, or any combination thereof, the court or the arbitrators . . . shall
>
> (1) add to the amount of compensatory damages in the . . . verdict of the jury . . . damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict, or decision;
>
> (2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of the action, which ever is later, up to the date of the award, verdict, or decision.
>
> * * *
>
> Except as provided in subdivision (3), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in this action.
>
> * * *
>
> (e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

More particularly, the issue preserved for our review[2] concerns whether Pennsylvania's Rule 238 may be invoked in a Federal Employers' Liability Act[3] suit heard in a court of common pleas. We believe it can be.

Our discussion starts with the proposition that state courts are forbidden from discriminating against a federal cause of action. This prohibition is manifested in the supremacy clause of Article VI of the United States Constitution, *see Tests v. Katt,* 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), and requires state courts to enforce federal law. *Household Consumer Discount Co. v. Vespaziani,* 490 Pa. 209, 415 A.2d 689 (1980). Since Congress has made available the state courts, as well as federal ones,[4] for the vindication of that right, it is our task to determine whether federal or state law governs the resolution of a given question concerning the federally created cause of action. *Id.*

Instantly, this means that "[s]ince [Humphries'] claim arises under a federal statute, whether prejudgment interest will be allowed is initially a question of federal law and not the law of the forum state. *See* Wallis v. Pan

[2] To the extent that the defendant demands that this Court resolve the constitutionality of Rule 238, we decline the invitation. Since this issue was not presented to the court below, we find the issue waived. *See Benson v. Penn Central Transportation Co.,* 463 Pa. 37, 41, 342 A.2d 393, 395 (1975). However, we do note that this question has been ruled upon in a manner that is not favorable to the defendant. *See Marks v. Mobil Oil Corp.,* 562 F.Supp. 759 (E.D. Pa. 1983).

[3] 45 U.S.C. §51 *et seq.* (hereinafter referred to as the Act or FELA).

[4] The Federal Employers' Liability Act, which imposes liability upon railroad companies engaged in interstate commerce for injuries or wrongful death of their employees, provides that jurisdiction of the federal courts over actions brought under the Act shall be concurrent with that of the courts of the several states. 45 U.S.C. §56.

American Petroleum Corporation, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966); 1A Moore's Federal Practice §§0.318, 0.323[12] (2nd ed. 1959)."[5] *Southern Pacific Co. v. Miller Abattoir Co.*, 454 F.2d 357, 362 (3rd Cir. 1972).

Thus, we wish to emphasize that, albeit a federal court sitting in diversity must look to local law to determine the availability of prejudgment interest, *see Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 855 (U.S. App. D.C. 1981), *cert. denied*, 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982), such is not the rule in cases arising under federal law. *See Furtado v. Bishop*, 604 F.2d 80, 97 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980). Applying this precept to the case *sub judice*, we find "[i]t has long been settled that questions concerning the measure of damages in an FELA action are federal in character. This is true even if

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[5] *Accord Robinson v. Watts Detective Agency*, 685 F.2d 729, 741 (1st Cir. 1982) ("Because Count I of the complaint stated a cause of action arising under the Bankruptcy Act, whether or not the trustee is entitled to prejudment interest as an element of damages is a matter of federal law." (Citations omitted)); *Moore-McCormack Lines, Inc. v. Amirault*, 202 F.2d 893, 896 (1st Cir. 1953) (In discussing prejudgment interest, the court observed that "quite a different situation is presented when action is brought on a claim arising under federal, not state, law. *See Brooklyn Savings Bank v. O'Neil*, 1945, 324 U.S. 697, 714-716, 65 S.Ct. 895, 89 L.Ed. 1296[.]"); *cf. Unique Systems, Inc. v. Zotos International, Inc.*, 622 F.2d 373, 381 (8th Cir. 1980) (Interest was allowed on a debt before it was reduced to judgment "[i]n this diversity case where the right of action ar[o]se[ ] under state law . . ..").

the action is brought in state court."[6] (Citations omitted) *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689 (1980). Our own decisional law on the subject is not inconsistent with such a pronouncement. *See, e.g., Hogarty v. Philadelphia & Reading Railroad Co.*, 255 Pa. 236, 240, 99 A. 741 (1916) ("The Federal Employers' Liability Act of 1908 supercedes the laws of the states upon all matters within its scope, and, in cases involving accidents to the employees of railroad companies, when engaged in interstate commerce, the state laws must be regarded as nonexistent." (Citations omitted)); *Snyder v. Penn Central Transportation Co.*, 296 Pa.Super. 69, 73, 442 A.2d 300, 302 (1982) ("In a F.E.L.A. case, federal rather than state law governs . . .."); *Ignacic v. Penn Central Transportation Co.*, 291 Pa.Super. 431, 436 A.2d 192 (1981) (semble); *see also Schnars v. Union Railroad Co.*, 410 Pa. 538, 189 A.2d 884 (1963) (Although under Pennsylvania law an employee could not sue his employer, such is not the case under federal law because of the Federal Employers' Liability Act).

However, as is conceded by all concerned, and a review of the statute confirms this, the Federal Employers' Liability Act makes neither a provision allowing nor forbidding prejudgment interest such as was awarded by

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[6] It is to be observed that our Supreme Court in *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 66, 436 A.2d 147, 154 (1981), remarked, as to Rule 238, "[a]lthough the award for delay of time may be 'in the nature of interest,' in reality, it is merely an extension of the compensatory damages necessary to make a plaintiff whole." This, of necessity, undermines plaintiff-appellee's argument that "equating interest with damages is erroneous" and that "Rule 238 interest—apart from other prejudgment interest rules—is not compensatory and, as such, should not be considered to be an element of 'damages' as that term is commonly used." (Appellee's Brief at 3 & 8).

the trial court here. Despite this absence of an unequivocal prohibition against interest in the Act itself, we have been directed to the general interest statute governing federal civil actions, 28 U.S.C. §1961. *See Murphy v. Lehigh Valley R. Co.*, 63 F.Supp. 928 (E.D. N.Y. 1945). Section 1961 reads, in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court . . .. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.[7]

It is true that the preceding has been construed, in the context of the Federal Employers' Liability Act in *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944), to encompass *post* judgment interest, or, at the most, an award of interest tabulated from the date a verdict is rendered to the date judgment is entered. This fact has been seized upon by the defendant-appellant as the cornerstone for its proposition that the Act's silence on the question of "interest", even reading Section 1961 liberally, does not sanction the awarding of prejudgment interest. *Id.*

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[7] Section 1961 was amended April 2, 1982, Pub.L. 97-164, Title III, §302(a), 96 Stat. 55; September 13, 1982, Pub.L. 97-258, §2(m)(1), 96 Stat. 1062; January 12, 1983, Pub.L. 97-452, §2(d)(1), 96 Stat. 2478. However, because of the dates of the amendments, no more need be said than that they do not impact on the 1978 cause of action here.

Although the Fifth's Circuit's position in Pratt has been followed in a number of state courts,[8] we notice that most recently this stance, as it affects Section 1961 and federal causes of action in regard thereto, has been altered. For example, in *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), an employee brought suit against his employer under the Outer Continental Shelf Lands Act (OCSLA) for injuries he sustained while on the job. The employer contended, *inter alia*, that the district court should not have awarded prejudgment interest in light of Section 1961's prohibition against same, and he cited a number of Fifth Circuit cases in support of the contention. Circuit Judge Patrick E. Higgenbotham, speaking for the Court, admitted that there existed a conflict in the circuit as to the law on this point.

In response to this diversity of opinion that had manifested itself in the circuit, the Court opted to renounce its former, unfavorable position on the issue of prejudgment interest and adopted, instead, a posture consonant with that espoused in *Ellis v. Chevron U.S.A.*

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[8] *Wicks v. Central Railroad Company of New Jersey*, 129 N.J.Super. 145, 322 A.2d 488 (1974), *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974) (Citing a New York case and other circuit court decisions). *Accord Felder v. Union Pacific Railroad Co.*, 660 P.2d 911, 914-915 (Colo.App. 1982) (Prejudgment interest may not be awarded in a Federal Employers' Liability Act case); *Bennett v. Atchinson T. & S.F. Ry. Co.*, 174 N.W. 805, 807 (Iowa 1919) (The action of the court in refusing to allow interest before judgment affirmed); *contra Leitch v. Chesapeake & O. Ry. Co.*, 97 W.Va. 498, 125 S.E. 370, 373-374 (1924); *Sweet v. Chicago & N.W. Ry. Co.*, 157 Wis. 400, 147 N.W. 1054, 1058 (1914) ("Where an act of Congress [FELA] commits to the state court the duty of trying cases arising thereunder such cases may be tried according to the state rules of procedure.").

Inc., 650 F.2d 94 (5th Cir. 1981). In doing so, the Court made statements that are quite germane to the case at bar; *viz.*:

> [I]n *Ellis*, an OCSLA wrongful death case, we upheld a denial of prejudgment interest once again, but only on the ground that the district court had "properly exercised its discretion." 650 F.2d at 98. *The panel there read 28 U.S.C. §1961 as mandating postjudgment interest but also permitting prejudgment interest.* Thus, it concluded that the district court "could have left intact its award of prejudgment interest if it found 'other principles of law' which justified the award . . ." *Id.* (quoting *Illinois Cental Railroad Co. v. Texas Eastern Transmission Corp.*, 551 F.2d 943, 944 (5th Cir. 1977).
>
> We think *Ellis* is the better view. *Ellis reads the federal interest statute as permissive on the matter of prejudgment interest; Berry [v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974)] and *Aymond [v. Texaco, Inc.*, 554 F.2d 206 (5th Cir. 1977)] read it as prohibitory. The problem with the latter reading is that 28 U.S.C. §1961 governs all civil actions in federal district courts, *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir. 1980), except diversity cases, *Degelos Bros. Grain Corp. v. Fireman's Fund Insurance of Texas*, 498 F.2d 1238, 1239 (5th Cir. 1974), yet prejudgment interest has frequently been awarded in nondiversity cases without express statutory authority (for example, suits in the admiralty). Indeed, *Berry* and *Aymond* appear to contravene the almost universal view that "section 1961 does

not by its silence bar the awarding of prejudgment interest . . ." *Bricklayers Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir. 1982) (citing cases).

Ellis indicated that an award of prejudgment interest in an OCSLA case might be justified by "other principles of law." We think the Louisiana statute providing for interest from the date of judicial demand, La.Rev.Stat. §13:4203, is such a principle. Accordingly, we hold that where, as here, a district court awards prejudgment interest to a prevailing OCSLA plaintiff whose remedy is based on surrogate state law, the award should not be disturbed on appeal if supported by that state law.

This holding, we believe, is consistent with the precepts of *Rodrigue [v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969)] and [*Chevron Oil Co. v.] Huson*, [404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)]. Prejudgment interest, and inflationary measures, ought to be regarded as integral to each other and to the state law remedy, particularly when the final judgment is being entered, as it is here, more than a decade after the suits were originally filed. *See General Motors Corp. v. Devex Corp.*, _____ U.S. _____, _____ n. 10, 103 S.Ct. 2058, 2062-2063, 76 L.Ed.2d 211 (1983). (Emphasis added) (Footnote omitted)

708 F.2d at 984. We read *Olsen* to endorse the awarding of prejudgment interest to a plaintiff, who sues under a federal statute, *when the remedy is based upon and supported by the state law where the district court sits.*

This would seem to sound the death knell, *sub silentio*, for *Pratt*, since *Pratt* also dealt with a cause of action premised upon a federal statute (FELA) that relied upon 28 U.S.C. §811 (now Section 1961) to conclude that a Louisiana law on prejudgment interest did not apply to avail the plaintiff the opportunity to secure interest from the date of judicial demand, *i.e.*, the date suit was filed in federal court.

Drawing such a corollary from *Olsen* is not at odds with, and in fact seems to have been forecasted by, two United States Supreme Court rulings, *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261, 36 S.Ct. 586, 60 L.Ed. 989 (1916) and *Massachusetts Benefit Association v. Miles*, 137 U.S. 689, 11 S.Ct. 234, 34 L.Ed. 834 (1891).

In *Stewart*, a cause of action under the FELA was brought in state court against the railroad company for negligently causing the death of the plaintiff's intestate, her husband. Two trials took place in which a lesser amount was obtained by the plaintiff after the second proceeding. Because a review by the state court proved unsatisfactory to the railroad company and plaintiff, cross-appeals were filed to the Supreme Court. The railroad company complained that, among other things, the Kentucky court of appeals was not authorized to add 10% in damages to the amount of the award. In dismissing this averment, the *Stewart* Court held:

> The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas,

> and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So, the state may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceeding and the judgment is affirmed, as, but for such proceedings, interest would run as of course until the judgment was paid.

241 U.S. at 263, 36 S.Ct. at 588. *Accord Louisville & N.R. Co. v. Holloway*, 246 U.S. 525, 38 S.Ct. 379, 62 L.Ed. 867 (1918); *Locke v. Allstate Insurance Co.*, 696 F.2d 1340 (11th Cir. 1983) (Alabama 10% damages added to unsuccessful appeal regarding money judgment).

In *Miles*, the Supreme Court was elaborating upon the precursor to 28 U.S.C. §1961, Section 966 of the Revised Statutes, originally enacted August 23, 1872, c. 118, §8 (5 St. at Large, 518), and its scope of authority in the area of prejudgment interest; more succintly, assimilating into the federal statute state laws that condone the entry of "interest upon verdicts." It stated its approval in the following terms:

> At common law neither verdicts nor judgments bore interest; *but by Revised Statutes, §966, "interest shall be allowed on all judgments in civil cases, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be*

levied under process of execution on judgments and recovered in the courts of such state, and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state." Did the case rest solely upon this statute, it is difficult to see how interest could be computed upon this verdict, inasmuch as the specific allowance of interest upon judgments would seem to exclude the inference that interest should be allowed upon verdicts before judgment. But by an act of the legislature of Pennsylvania, passed in 1859, it is declared to "be lawful for any party or parties in whose favor any verdict may be rendered for a specific sum of money to collect and receive interest upon such sum from the date of the verdict; and every general judgment entered upon such verdict, whether by a court of original jurisdiction or by the supreme court, shall be deemed and held to be a judgment of the sum found by the verdict, with interest thereon from the date of such finding." We regard this statute as settling the question in favor of our jurisdiction. *Section 966, while providing only for interest upon judgments, does not exclude the idea of a power in the several states to allow interest upon verdicts, and, where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff of when he ought not be deprived by a removal of his case to the federal court.* The courts of the state and the federal courts sitting within the state should be in harmony upon this point. *Both in Holden v.*

> *Trust Co., 100 U.S. 72, and in Ohio v. Frank, 697, it was held that the question of interest is always one of local law.* (Emphasis added).

137 U.S. at 691, 11 S.Ct. at 235.

Instantly, we are confronted, as was the Court in *Miles*, with assessing the impact of a Pennsylvania law (Rule 238 here, an 1859 statute there) upon the general interest statute governing federal actions. Consistent with the thinking implicit in *Miles*, we favor an approach that does not exclude the idea, notwithstanding Section 1961's reference to interest on judgments only, of a state, which in our case would be the judiciary by constitutional mandate, promulgating a rule of law that permits the recoupment of prejudgment interest. In point of fact, our Supreme Court has done just that by forgoing Rule 238 into use. Thus, as did the Court in *Miles*, we equate this with a right given to a successful plaintiff, of which he ought not to be deprived of by an overly constrained reading of a federal statute on the subject of interest. And, "[t]he courts of the state and the federal courts sitting within the state should be in harmony upon this point." *Massachusetts Benefit Association v. Miles, supra*, 137 U.S. at 691, 11 S.Ct. at 235. We think it not too presumptuous to remark that we are at the cross-roads on this issue, given the Third Circuit's endorsement of Rule 238 by the district courts sitting in Pennsylvania hearing diversity cases. *See Jarvis v. Johnson*, 668 F.2d 740 (3rd Cir. 1982) and *Osborne v. Baker*, 528 F.Supp. 387 (W.D. Pa. 1981).

At this stage it also requires mention that even the author of the *Pratt* decision, which seems to be the polestar for defendant's denunciation of Rule 238,

refused to give the federal statute such a judicial glossing that it could not be read to accommodate "interest after verdict." This is borne out by the following:

> State statutes are superseded by the Federal Employers' Liability Act only in so far as they are in conflict therewith, and said Liability Act does not legislate upon interest after verdict; hence it is not in conflict with any state statute that allows interest from the verdict. State and federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a question of local law; and, for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it is practicable to do so. (Footnotes omitted).

142 F.2d at 849-850.

We believe that the logic expressed in the preceding passage comports with the thinking of the United States Supreme Court in *Stewart* and *Miles*, which is that Section 1961 "does not exclude the power in several states to allow [prejudgment] interest . . . where such allowance is expressly made by a state statute . . .." *Massachusetts Benefit Association v. Miles, supra*, 137 U.S. at 691, 11 S.Ct. at 235. In accordance therewith, we find it proper for the Commonwealth to provide for prejudgment interest against those defendants who make no attempt to settle a dispute or whose offer falls 25% short of the award secured by the plaintiff at trial. *Cf.*

Louisville & Nashville Railroad Co. v. Stewart, supra. In either instance, under the rationale initially expressed in *Miles,* paraphrased in *Stewart* and undeniably evident in both *Olsen* and *Pratt,* Section 1961 is neither affronted nor contravened, but, rather, coexists harmoniously with Rule 238.

Accordingly, after assiduously scrutinizing the subject at hand in adherence with accepted practice, *see Rodgers v. United States,* 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947); *Household Consumer Discount Co. v. Vespaziani, supra,* we conclude that while the FELA does not fix the rate of prejudgment interest, the allowance of such interest pursuant to Rule 238 comports with our understanding of the federal decisional law on the matter. *See Reed v. Director General of Railroads,* 267 Pa. 86, 89, 110 A. 254 (1920) ("the Supreme Court of the United States ... is, of course, the final arbiter in construing the Federal Employers' Liability Act[.]"); *cf. Royal Indemnity Co. v. United States,* 313 U.S. 289, 297, 61 S.Ct. 995, 998, 85 L.Ed. 1361 (1941) ("While the New York statute fixing the rate of interest is not controlling, the allowance of interest does not conflict with any state or federal policy and we think that in the circumstances of this case a suitable rate is that prevailing in the state where the obligation was given and to be performed." (Citations omitted)).

Further, we believe that cases which declare that the acts of Congress supersede all state legislation on the subject of liability of railroad companies to their employees have nothing to do with the matter at hand. The Pennsylvania procedural rule does not meddle with

that. It deals only with *interest* on the monetary loss resulting from the damage or injury "compute[d] . . . from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the . . . verdict or decision [at 10% per annum.]" Pa.R.Civ.P. 238(a)(1) & (2). Additionally, it cannot be seriously contended that Congress did not anticipate suits in state courts on the question of interest under the FELA. Given Section 1961, and its interpretation by the federal courts, it seems plausible that Congress contemplated and accepted state procedure in advance. *See Louisville & Nashville Railroad Co. v. Stewart, supra; Massachusetts Benefit Association v. Miles, supra; see generally Dickinson v. Stiles,* 246 U.S. 631, 38 S.Ct. 415, 62 L.Ed. 908 (1918); Note, Prejudgment Interest: An Element of Damages Not to be Overlooked, 8 Cumberland L.Rev. 521 (1977).

Therefore, we do not perceive the Pennsylvania rule to be adverse to federal policy, for a state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to secure prejudgment interest. *See Robertson v. Wegmann,* 436 U.S. 584, 593, 98 S.Ct. 1991, 1996, 56 L.Ed.2d 554 (1978). Remaining with this subject for a little longer, we wish to respond to defendant-appellant's prophecy that if we were to sanction the use of prejudgment interest we would pervert the "uniform" application of the FELA, which is essential to effectuate its purpose. *See* note 7, *supra.* In answer, we firmly believe that whatever the value of nationwide uniformity in a particular area of the

law may be, *e.g.*, FELA, where Congress has not spoken clearly, state law will often provide the content for the federal remedial rule. No less is this true here, where Congress makes reference in Section 1961 to state law in fixing the rate of interest on judgments. *See Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 757 (9th Cir. 1983). Consequently, this statutory reliance upon state law obviously means that there will not be nationwide uniformity on this issue. *See Robertson v. Wegmann, supra*, 436 U.S. at 593 n. 11, 98 S.Ct. at 1997 n. 11; *cf. Klaxon Co. v. Stentor Electric Mfg. Co., supra*, 313 U.S. at 496, 61 S.Ct. at 1022.

Notwithstanding the aforesaid, as touched upon earlier in this Opinion, the Third Circuit's acceptance in *Jarvis v. Johnson, supra*, of Rule 238 as a "substantive" appendage to Pennsylvania law goes a long way to discount defendant-appellant's prophetic remarks, at least in this jurisdiction. *Cf. Murphy v. Lehigh Valley R. Co., supra*, 63 F.Supp. at 930 ("The Court of Appeals has refused to apply the State statute dealing with interest (in that case New York State Decedent Estate Law §132, Consol. Laws N.Y. c. 13); and if the federal courts follow the statute applicable, 28 U.S.C.A. §811 [now 28 U.S.C. §1961], then, at least in New York, there will be harmony between the forms of judgment in the State and federal courts in cases under the [F]ederal Employers' Liability Act.").

Based on the above, we deem it unnecessary to embark on an extended discussion of the procedural/substantive dichotomy that has pervaded the courts of this land since the Supreme Court's decision in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *See, e.g., Moore-McCormack Lines v. Amirault,* 202 F.2d 893, 896-897 (1st Cir. 1953); Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St.L.J. 384 (1956).[9]

Judgment affirmed.

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[9] We would like to mention that Rule 238 has been referred to by our Supreme Court, in the course of sustaining its constitutional authority to enact same, in procedural terms. Yet, it has not been labelled as being totally devoid of substantive attributes. *See, Laudenberger v. Port Authority of Allegheny County,* 496 Pa. 52, 436 A.2d 147 (1981). On the other hand, the Third Circuit, in *Jarvis v. Johnson,* 668 F.2d 740 (3rd Cir. 1982), has viewed Rule 238 as substantive in nature, and, therefore, applicable in federal diversity suits under the *Erie* doctrine. We point this out to show that the line of demarcation between what is procedural *vis-a-vis* substantive is not static and requires analysis under the particular case to make such a determination. *See* Anno., Comment note.—Applicability of state practice and procedure in Federal Employers' Liability Act actions brought in state courts, 79 A.L.R.2d 553; *see generally* Anno., Interest on amount of recovery under Federal Employers' Liability Act, 153 A.L.R. 857.

APPENDIX B

Opinion and Order of the Court of Common Pleas of Allegheny County

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Civil Division No. GD 78-23858
Issue No. 106925
Code 009—Trespass/F.E.L.A.
Before: Finkelhor & Zeleznik, *JJ.*

HOWARD H. HUMPHRIES,

Plaintiff,

vs.

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY,

Defendant.

OPINION AND ORDER OF COURT.

ZELEZNIK, *J.*

Counsel of Record:
—John P. Gismondi, Esquire,
Attorney for Plaintiff.
—Robert S. Garrett, Esquire,
Attorney for Defendant.

Copies sent to Counsel of Record (above):
April 16 (20), 1982.

rec 4/22/82

Appendix B—Opinion and Order of the Court of Common Pleas of Allegheny County.

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HOWARD H. HUMPHRIES,

Plaintiff,

vs.

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY,

Defendant.

OPINION.

ZELEZNIK, *J.*

The question of law involved in this Motion for Judgment *N.O.V.* or for Remolding the Verdict is whether Rule 238 damages are applicable to F.E.L.A. cases. This case was tried to a jury and resulted in a verdict for the plaintiff in the amount of $12,400.00. The plaintiff then moved for an award of delay damages pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure. The parties agreed that if Rule 238 is applicable, the amount of $3,203.00 is properly calculated. On December 21, 1981, the trial judge granted plaintiff's Motion for Prejudgment Interest and

remolded the verdict by adding delay damages in the amount of $3,203.00, reflecting a total plaintiff recovery of $15,603.00.

The rule concerning application of state law to F.E.L.A. cases is well established and may be stated as follows:

> "All laws concerning procedural matters are to be applied, whereas those concerning substantive matters are not." See generally: *Annotation 79 A.C.R. 2d 553.*

The issue then is whether Rule 238 is procedural or substantive.

In the recent case of *Laudenberger v. P.A.T.*, 436 A.2d 147 (1981), the Pennsylvania Supreme Court declared the Rule to be procedural. Nevertheless, defendant suggests that such declaration is not dispositive since the same law may be deemed procedural in one context and substantive in another. The defendant argues that in the instant case we are dealing in a context different from *Laudenberger*, specifically, the application of state rules to federally-created rights. *Laudenberger* analyzed Rule 238 in the context of the state Supreme Court's rule-making authority.

Assuming that context to be relevant, it is informative to review cases which have specifically characterized state rules as procedural or substantive in determining their applicability to F.E.L.A. cases. The following diverse matters have been deemed "procedural", and thus applicable to F.E.L.A. cases:

> (1) Manner and form of directing and sustaining verdicts. *Annotation, supra*, §7(a).

(2) Necessity, form and effect of jury instruction. *Annotation, supra,* §7(b).

(3) Pleadings and objections or amendments thereto. *Annotation, supra,* §8.

(4) Commencement of an action for purposes of statute of limitations. *Irons v. Michigan-Atlantic Corp.,* 108 NY S 2d 824 (1951).

(5) Rules of evidence. *Annotation, supra,* §10.

Other cases have dealt expressly with state laws concerning damages. There is little dispute that the measure of damages is a matter of substance, and therefore to be controlled by federal law. However, several state laws which directly affect the ultimate amount of verdict recovery have been held to be non-substantive, and therefore applicable to F.E.L.A. actions. Both the U.S. Supreme Court and several states have consistently held that local law governs questions of excessiveness or inadequacy of damages. *Louisville & N.R. Co. v. Holloway,* 246 U.S. 525 (1918); *Jehl v. So. Pacific Co.,* 427 P.2d 988 (1975); *Smith v. Ill. C.R.,* 172 NE2d 803; *Advance v. Thompson,* 51 NE2d 334 (1943); *Rogers v. Thompson,* 308 SW2d 688 (1958). More significantly, the United States Supreme Court has held that a state law providing for ten percent post-judgment interest where an unsuccessful appellant obtains a stay pending appeal applies to F.E.L.A. cases. *Louisville & N.R. Co. v. Stewart,* 241 U.S. 261 (1916).

Notwithstanding defendant's argument that Rule 238's application may affect the ultimate verdict amount and may also produce a different result depending on

whether obtained in a federal court or a state court, we believe the Rule should be construed as procedural, and thus applicable to F.E.L.A. cases tried in the state courts. We distinguish between the elements of damage which one may put into evidence and argue to the jury, and matters which are court-applied principles or rules adjusting the amount of recovery. The former, dealing with matters such as allowance of recovery for pain and suffering, net wage loss rather than gross wage loss, and the standing and bases of recovery in wrongful death cases are substantive. The latter, dealing with post-judgment interest or review of excessiveness or inadequacy, are professional. No substantive rights of liability are controlled by a pre-judgment interest law such as Rule 238. We should not quickly apply the axiom that "damages are substantive" merely because the Rule affects the ultimate recovery. If we were to do so, the entire realm of state procedural rules would be ineffective or inapplicable, since each of these rules can be said to affect the ultimate verdict amount or ultimate recovery.

Concerning defendant's argument that Rule 238 will mean a different verdict amount in state-tried F.E.L.A. cases than those tried in the federal courts, that argument is equally without merit. The outcome-determinative test is too shallow an analysis to apply to federal-state choice of law problems and was "never intended to serve as a talisman". *Hanna v. Plummer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge*, 356 U.S. 525 (1958). As stated earlier in this Opinion, almost every state rule discussed has the capacity to affect the final outcome of a case. Nevertheless, many of them will be applied to

F.E.L.A. cases. For example, in *Irons, supra*, the court held applicable the state definition of "commencement" for purposes of the running of the federally-mandated statute of limitations. In doing so, it found timely an action which otherwise may have been deemed barred in federal court. Nothing could be more clearly "outcome-determinative" as that rule when applied to the F.E.L.A. suit in a state court. The very existence of federal-state concurrent jurisdiction presumes that cases will be subject to different rules and, at times, different outcomes.

The defendant's concern for uniformity overlooks the Commonwealth's interest in this matter. F.E.L.A. cases will continue to be filed in the state courts. After much consideration, the Commonwealth of Pennsylvania has determined that its best interests will be served by having a law such as Rule 238 to assist in relieving congestion in our civil courts. It is no compelling reason that a select group of cases which both parties voluntarily choose to litigate in state courts should prohibit the Commonwealth from implementing its policy choice. A defendant has the option of removing a case to a federal court under 28 U.S.C. §1441.

Defendant's Motion for Judgment *N.O.V.* or for Remolding the Verdict will be denied.

Appendix B—Opinion and Order of the Court of Common Pleas of Allegheny County.

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Civil Division No. GD 78-23858
Issue No. 106925
Code 009—Trespass/F.E.L.A.
Before: Finkelhor & Zeleznik, *JJ.*

HOWARD H. HUMPHRIES,

Plaintiff,

vs.

PITTSBURGH & LAKE ERIE
RAILROAD COMPANY,

Defendant.

ORDER OF COURT

AND NOW, to-wit, this 16th day of April, 1982, for reasons set forth in the foregoing Opinion, it is hereby ORDERED that defendant's Motion for Judgment *N.O.V.* or for Remolding the Verdict be and the same is denied, and judgment to be entered upon payment of verdict fee.

BY THE COURT
ZELEZNIK, *J.*

I CONCUR:
MICHAEL K. FINKELHOR, *J.*

APPENDIX C

Motion for Judgment *N.O.V.* or for Remolding the Verdict

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Civil Division No. GD78-23858
Issue No. 106925
Code 009 –Trespass/F.E.L.A.

HOWARD H. HUMPHRIES,

Plaintiff,

vs.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,

Defendant.

MOTION FOR JUDGMENT *N.O.V.* OR FOR REMOLDING THE VERDICT.

Dec 30 3:22 PM '81
Court of Common Pleas
Allegheny County

Filed on behalf of
Pittsburgh and Lake Erie
Railroad Company, Defendant

Appendix C—Motion for Judgment N.O.V. or for Remolding the Verdict.

Counsel of Record for this Party:

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Gilardi & Cooper
Firm #157
808 Grant Building
Pittsburgh, PA 15219
(412) 391-9770

Trial Judge:
Hon. Richard G. Zeleznik

Appendix C—Motion for Judgment N.O.V. or for Remolding the Verdict.

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Civil Division No. GD 78-23858

HOWARD H. HUMPHRIES,

Plaintiff,

vs.

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,

Defendant.

MOTION FOR JUDGMENT N.O.V. OR FOR REMOLDING OF THE VERDICT.

AND NOW this 30th day of December, 1981, comes the Defendant, The Pittsburgh and Lake Erie Railroad Company by its attorney, G. Edward Yurcon, Esq., and respectfully moves the Court for Judgment *N.O.V.* or for Remolding of the Verdict, and in support of its said Motion files the following:

1. The verdict, as molded by the court, allowing delay damages pursuant to Pa. R.C.P. 238, is against the law applicable to an action under the Federal Employer's Liability Act.

Appendix C—Motion for Judgment N.O.V. or for Remolding the Verdict.

2. The right to an award of delay damages in an action brought under the Federal Employer's Liability Act is a matter pre-empted by Federal law, and Pennsylvania law is inapplicable.

3. The verdict, as molded by the Court allowing delay damages in this Federal Employer's Liability Act action, is violative of the due process and equal protection clauses of the Pennsylvania and Federal Constitutions.

Respectfully submitted,

By: G. EDWARD YURCON
Attorney for Defendant

APPENDIX D

45 U.S.C. Section 51

Section 51 Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

APPENDIX E

Pennsylvania Rule of Civil Procedure No. 238

RULE 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage

(a) Except as provided in subdivision (e) in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1836, P.L. 715 as amended 5 P.S. Section 30 *et seq.*, or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. Section 1301.101 *et seq.*, shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

Appendix E—Pennsylvania Rule of Civil Procedure No. 238.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

NOTE: In additional defendant proceedings, the additional defendants will be considered the "defendant" for purposes of this subdivision, and the "plaintiff" will be either the original defendant if liability over is claimed, or the original plaintiff if direct liability is claimed, or both if both forms of liability are claimed.

(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages for delay shall be computed from the date plaintiff filed the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

Appendix E—Pennsylvania Rule of Civil Procedure No. 238.

(g) This rule shall not apply to

(1) eminent domain proceedings:

NOTE: See Article VI, Sec. 611 of the Eminent Domain Code of 1964, Special Session, June 23 P.L. 84, 26 P.S. Section 1-611, governing compensation for delay in payment.

(2) pending actions in which damages for delay are allowable in the absence of this rule.

NOTE: See Marrazzo v. Scranton Nehi Bottling Co., Inc., 438 Pa. 72, 263 A.2d 336 (1970) for instances in which compensation for delay may be allowed in actions for destruction or involuntary conversion of property where the compensation can be measured by market value or other definite standards.

Adopted Nov. 20, 1978, effective 120 days after Dec. 16, 1978. Amended Dec. 16, 1983, effective July 1, 1984.

APPENDIX F

Amendments V and XIV, United States Constitution

AMENDMENT V,
UNITED STATES CONSTITUTION

". . . . nor be deprived of life, liberty, or property, without due process of law; . . . ."

AMENDMENT XIV,
UNITED STATES CONSTITUTION

"Section 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction on the equal protection of the laws."

APPENDIX G

List of Parent Corporations, Subsidiaries, and Affiliates of Petitioner Pittsburgh and Lake Erie Railroad Company

P&LE SUBSIDIARIES

The Mahoning State Line Railroad Company
Suite 780 Commerce Court
No. 4 Station Square
Pittsburgh, PA 15219

The Monongahela Railway Company
Six Penn Center Plaza
Philadelphia, PA 19104

Montour Railroad Company
Suite 780 Commerce Court
No. 4 Station Square
Pittsburgh, PA 15219

The Pittsburgh, Chartiers and Youghiogheny Railway Company
Six Penn Center Plaza
Philadelphia, PA 19104

Youngstown and Southern Railway Company
Suite 780 Commerce Court
No. 4 Station Square
Pittsburgh, PA 15219

Appendix G—List of Parent Corporations, Subsidiaries, and Affiliates of Petitioner Pittsburgh and Lake Erie Railroad Company.

P&LE PARENT AND ITS SUBSIDIARIES

Pleco Inc. (Parent of P&LE RR Co.)
7th Floor Commerce Court
Pittsburgh, PA 15219

P&LE Car Management Company
7th Floor Commerce Court
Pittsburgh, PA 15219

P&LE Land Company
7th Floor Commerce Court
Pittsburgh, PA 15219

P&LE Coal Logistics Company
7th Floor Commerce Court
Pittsburgh, PA 15219

West Newton Coal Logistics Company
571 East Main Street
Somerset, PA 15501

Colona River Services, Inc.
P.O. Box 100
Monaca, PA 15061

Station Square Hotel Associates

Pocono Northeast

AFFILIATES

The Beloit Corporation
1 St. Lawrence Avenue
Beloit, WI 53511